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IN THE

Supreme Court of the United States

October Term, 1935.

No. 273.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, and THOMAS B. MACMILLAN, JOHN L. BRENTZELL, JANE B. WHEELER and ANNA L. MEYER, *Petitioners.*

vs.

AVERY J. BRADFORD, Receiver of THE BANK OF PITTSBURGH NATIONAL ASSOCIATION, in Lieu of C. O. THOMAS, Receiver at the Time Suit was Brought, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

JOHN G. FRAZER,
ROBERT L. KIRKPATRICK,
747 Union Trust Building,
Pittsburgh, Pennsylvania.
Attorneys for Respondent.

GEORGE P. BARSE,
Attorney for
Comptroller of the Currency
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

SUBJECT INDEX.

	Page
I. Counterstatement of the Case	1
II. Summary of Argument	5
III. Argument	6
A. The Jurisdiction of the District Court	6
B. It was the Duty of the District Court to exercise jurisdiction and it properly refused to surrender it in favor of the State Court	9
C. The right of the Receiver to proceed by plenary suit in the Federal Court in lieu of establishing his claim in the Orphans' Court	21
D. The Federal Court had jurisdiction to determine the nature or status of the claims as general, or preferred, or entitled to priority payment, as the circumstances of the case required, and the judgment thus rendered does not encroach upon the jurisdiction of the Orphans' Court nor disturb the assets in its custody	24
E. Petitioners' Authorities on the question of jurisdiction and its exercise	29
F. All indispensable parties were before the court	34
Conclusion	35
Appendix	37

CASES CITED.

Page

Alexander v. Fidelity Trust Co., 249 Fed. 1, 13 (C. C. A-3) 20
Alexander v. Hillman, decided by U. S. Supreme Court Dec. 9, 1935 9
Appeal of Hall et al., 112 Pa. 42, 54, 55 22
Arrowsmith v. Gleason, 129 U. S. 86, 98, 99 28
Bartley's Estate, 6 Pa. Dist. 436, 437; 19 Pa. Co. 599, 600 29
Bennington County Savings Bank v. Commercial National Bank (D. Ct. W. D. La.), 2 Fed. Supp. 201-203 27
Borer v. Chapman, 119 U. S. 587, 600 28
Brown v. Ellis, 86 Fed. 357, 358-359 (C. C. Vt.) 15
Byers v. McAuley, 149 U. S. 608 ..... 13, 32
Chicago Title & Trust Co. v. Fox Theatres Corporation, (C. C. A.-2), 69 Fed. (2) 60, 62 ..... 15, 26
Clews v. Jamieson, 182 U. S. 461, 479-480 8
Commonwealth of Pennsylvania v. Williams, 294 U. S. 176 30
Connecticut Life Insurance Co. v. Schurmeier, 117 Minn. 473, 475, 476 29
Crum v. Patterson, 64 Fed. (2) 263, 264 (C. C. A.-3) .. 7
Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458 (465) 35
Erwin v. Lowry, 7 How. 172, 180 28
Ex Parte John Chetwood, Jr., 165 U. S. 443, 458 7
Fowle v. Lawrason's Executor, 5 Peters, 495, 503 8
German Savings & Loan Society v. Cannon, (C. C. D. Wash.), 65 Fed. 542, 543, 544 28
Gibson v. Peters, 150 U. S. 342, 344 7
Goodwin v. Colwell, 213 Pa. 614, 616 23
Griswold et al. v. Central Vermont R. Co. (C. C. D. Vt.), 9 Fed. 797, 799, 800 28
Hammett's Appeal, 83 Pa. 392, 396 22
Harrison v. Moncravie, 264 Fed. 776 (C. C. A.-8) 14
Hayes v. Pratt, 147 U. S. 557, 570 28
Hinkley v. Art Students' League, 37 Fed. (2d) 225, 226-227, affirming the opinion of the District Court in 31 Fed. (2) 469, 471-472, certiorari denied 281 U. S. 733 18
Ingersoll v. Corum, 211 U. S. 335, 359, 360 28

Page

International Trust Company v. Weeks, 203 U. S. 364, 366 7
J. Elwood Lee Co. v. Grace Hospital (D. C. D. Mass.), 206 Fed. 994-996 29
Kerrison v. Stewart, 93 U. S. 155 35
Kline v. Burke Construction Co., 260 U. S. 226, 234, 235 ..... 10, 29
Lant v. Manley (C. C. E. D. Mich.), 71 Fed. 7, 12, 13.. 27
Lehman v. Spurway, 58 Fed. (2) 227, 228 (C. C. A.-5), certiorari denied, 287 U. S. 621 7
Liberty National Bank of South Carolina, at Columbia v. McIntosh, 16 Fed. (2) 906, 910 (C. C. A.-4).... 7
McClellan v. Carland, 217 U. S. 268 10
Nevitt v. Woodburn, 190 Ill. 283, 289, 290; 60 N. E. 500, 503 18
Olcott v. Headrick, 141 U. S. 543, 547, 548 20
Order of St. Benedict v. Steinhauser (C. C. D. Minn.), 179 Fed. 137, 150-151, (affirmed 234 U. S. 640, 652) 26
Pearson v. Brennan, 75 Fed. (2) 958, 962 (C. C. A.-1) 7
Penn General Casualty Co. v. Commonwealth of Pennsylvania, 294 U. S. 189 ..... 30, 31
Riehle v. Margolies, 279 U. S. 218..... 16
Riverdale Cotton Mills v. Alabama and Georgia Manufacturing Co., 198 U. S. 188, 195, 196 20
Schurmeier v. Connecticut Mutual Life Insurance Co., 171 Fed. 1, 4-5 (Certiorari dismissed 219 U. S. 586) 29
Schwartz v. Schwartz, 316 Pa. 318, 320 24
Security Trust Company v. Black River National Bank, 187 U. S. 211 27
Shelby v. Bacon, *et al.*, 10 How. 55, 69-70 ..... 15, 29
Smith v. Swormstedt, 16 How. 288 35
Strouse v. Lawrence, Admrx., 160 Pa. 421, 425..... 23
Swann v. Austell (D. Ct. N. D. Ga.), 253 Fed. 807, 809. 27
Thomas v. Commonwealth Trust Co., 2 Fed. Supp. 654, 655 (D. C. W. D., Pa.) 15
United States v. Weitzel, 246 U. S. 533, 541..... 7
Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33 ..... 11, 26
Wayman v. Southard, 10 Wheat. 1, 23 20
Yonley v. Lavender, 21 Wall. 276 32
Zimmerman v. Carpenter, 84 Fed. 747, 748-751..... 15

STATUTES CITED.

Page

Pennsylvania Act of April 6, 1925, P. L., 152, as amended by the Act of April 11, 1929, P. L. 512.. 2
Pennsylvania Act of June 26, 1931, P. L. 1384..... 24
Act of Assembly of Pennsylvania approved June 7, 1917, P. L. 447 18
Section 24(1) of the Judicial Code, 28 U. S. C. A. 41(1) 7
Section 24(16), 28 U. S. C. A. 41(16) 7
Federal Equity Rule 38 .....5, 34

TEXTS CITED.

21 Corpus Juris (93) 116 9
Bogert "Trusts and Trustees", pp. 2536, *et seq.*, Section 871 9

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vs.

AVERY J. BRADFORD, Receiver of THE BANK OF PITTSBURGH NATIONAL ASSOCIATION, in Lieu of C. O. THOMAS, Receiver at the Time Suit was Brought, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

I.

COUNTERSTATEMENT OF THE CASE.

Respondent adopts Petitioners' Statement of the Case but adds the following facts omitted therefrom or not fully set forth therein:

The Bank established and operated in its Trust Department a general trust fund of mortgages on real estate hereinafter called the "Mortgage Pool," under authority of a statute of the Commonwealth of Pennsylvania, approved April 6, 1925, P. L. 152, and the amendments and supplements thereto (R. 17). This Act is printed at page 37 of the Appendix to this brief.

From time to time, mortgages were executed and delivered to the Bank as mortgagee, and on receipt of a mortgage the Bank thereupon executed a certificate describing the mortgage and certifying that it was held by the Trust Department "in trust for those of its customers who have purchased participations therein" (R. 17). The mortgages were held by the Trust Department of the Bank and were segregated from the general assets of the Bank (R. 17). Participation Certificates in the trust so created were sold from time to time to various customers of the Bank and to various estates and trusts for which the Bank was acting as fiduciary. These Participation Certificates were issued by the Trust Department of the Bank, where the Mortgage Pool was managed as a separate trust, and set forth the name of the customer, the date, the amount stated in dollars, and certified that "the above estate is a participant to the extent of the amount indicated above" in the Mortgage Pool (R. 18).

The aggregate face value of mortgages in the Mortgage Pool at all times exceeded the aggregate face value of the participations, the excess varying from day to day depending on the amount of certificates then outstanding against the Pool and the face value of the mortgages then held in it. On September 21, 1931, the date of closing of the Bank, the aggregate face value of mortgages in the Mortgage Pool was $5,347,585.57, and of outstanding certificates $5,056,565.12. No Participation Certificate had been issued to the Bank and no payment had been made to it, for the excess of $291,020.45 (R. 18).

The interest due to certificate holders on August 15, 1931, approximately one month prior to suspension, exceeded mortgage interest which had then been collected by $57,156.76, and this amount was advanced by the Bank to the Mortgage Pool. When the Bank closed, the amount so advanced had been reduced to $40,213.58 by additional collections of interest made between August 15th and the date of closing (R. 19).

Since the Mortgage Pool was transferred to the Trustee, it has from time to time made payments on account of the principal and interest to holders of Participation Certificates, but no payments have been made to Respondent or to his predecessor.

Petitioner's brief states in this connection (p. 4) that the Orphans' Court "ordered that no payments be made to the receiver". The joint stipulation of facts in the record states (R. 20, 21, 22) that the orders of the Orphans' Court suspended payments to the receiver *pending the "judicial determination"* of his right to participate in the distribution. In order to be fair to opposing counsel, and in order that the Court may have the exact situation before it, respondent is willing to state de hors the record and in elaboration thereof that the several petitions filed in the Orphans' Court by the Trustee for the purpose of obtaining authority to distribute available funds contained prayers

> "that the said payment of principal and income in the sum of $291,020.45, claimed by the receiver of The Bank of Pittsburgh N. A. be suspended until the right of said receiver to the same be adjudicated by appropriate legal action."

The several orders of the Orphans' Court entered in response to said petitions provided that payments to the receiver be "suspended until further order of court."

Hence it appears to respondent that the aforesaid record stipulation (R. 20, 21, 22) may be explained as a paraphrasing of the *combined* language of the prayers in the petitions

of the trustee that the payments to the receiver be suspended pending a judicial determination and of the orders of the Orphans' Court entered in pursuance thereof that said payments be suspended until further order of court.

While it seems apparent that the trustee (petitioner) was aware of the fact that the receiver contended that he had the right of participation in the mortgage assets, neither respondent receiver nor his predecessor has ever filed a claim with the state court or with the trustee nor ever asked the state court to adjudicate the claim, and the record will not disclose such claims to have been filed in or adjudicated by the Orphans' Court. The Orphans' Court has taken no action other than the aforementioned orders suspending payments pending further order.

II.

SUMMARY OF ARGUMENT.

A.

The Juisdiction of the District Court.

The District Court acquired jurisdiction over the persons of the Petitioners. The cause of action was within the jurisdiction of a Federal court and was cognizable in equity.

B.

It Was the Duty of the District Court to Exercise Jurisdiction and It Properly Refused to Surrender It in Favor of the State Court.

Respondent had the right to invoke the jurisdiction of the District Court. The jurisdiction exercised was in personam and did not interfere with the possession or control of the res by the State Court.

C.

The Right of the Receiver to Proceed by Plenary Suit in the Federal Court in Lieu of Establishing His Claim in Orphans' Court.

D.

The Federal Court Had Jurisdiction to Determine the Nature or Status of the Claims as General, or Preferred, or Entitled to Priority Payment, as the Circumstances of the Case Required, and the Judgment Thus Rendered Does Not Encroach Upon the Jurisdiction of the Orphans' Court Nor Disturb the Assets in its Custody.

E.

Petitioners' Authorities on the Question of Jurisdiction and Its Exercise.

F.

All Indispensable Parties Were Before the Court.

It was not necessary to join as defendants all the holders of Participation Certificates. The case is a proper class suit and is squarely within the provisions of Equity Rule 38.

III.

ARGUMENT.

A.

The Jurisdiction of the District Court.

This is a suit in equity in a district court. Three elements must exist before there is jurisdiction to entertain such a suit: (1) The Court must acquire jurisdiction over the person of the defendant. (2) The suit must fall within the class of cases within which Federal courts are authorized to act. (3) The action must be one cognizable in a court of equity. If these three elements are present, the only remaining question is whether or not the Court should refuse to exercise its jurisdiction because of some other rule of law or some reason of policy. These phases of the discussion are considered under subdivisions B, C and D of the argument.

(1) *Jurisdiction Over the Persons of the Petitioners.*

A court obtains jurisdiction of persons in one of two ways—by the service of process or by submission. In this case, the Petitioners not only were served with process but a general appearance was entered as well (R. 1). Under such circumstances, there can be no question of the jurisdiction over the persons of the Petitioners. The presence of this element of jurisdiction is not questioned.

(2) *Federal Jurisdiction.*

The jurisdiction of the Federal courts extends only to the class of cases set out in the Constitution and the Acts of Congress. It is admitted by Petitioners (Petitioners' Brief, page 7) that this action falls within that class, but, in view of the discussion to follow, it may be well to point out that the Federal jurisdiction here involved does not depend upon the amount involved or the citizenship or resi-

dence of the parties. The proceeding in the District Court was on a Bill filed by the receiver of a national bank. Such a case falls squarely within Section 24 (1) of the Judicial Code, 28 U. S. C. A. 41 (1), which provides that the district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue," and Section 24 (16), 28 U. S. C. A. 41 (16), which provides that they shall have jurisdiction "of all cases commenced by the United States, or by the direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank."

It is uniformly held that a receiver of a national bank is an officer of the United States:

Gibson v. Peters, 150 U. S. 342, 344;
Ex Parte John Chetwood, Jr., 165 U. S. 443, 458;
United States v. Weitzel, 246 U. S. 533, 541;
Lehman v. Spurway, 58 Fed. (2d) 227, 228 (C. C. A. 5th), Certiorari denied 287 U. S. 621;
Liberty National Bank of South Carolina, at Columbia v. McIntosh, 16 Fed. (2d) 906, 910 (C. C. A. 4th).

Since the suit is for the collection of an alleged asset of the closed bank for distribution to its creditors, it is equally clear that the case relates to the winding up of the affairs of the Bank and, therefore, within the jurisdiction conferred by Section 24 (16):

International Trust Company v. Weeks, 203 U. S. 364, 366;
Crum v. Patterson, 64 Fed. (2d) 263, 264 (C. C. A. 3rd);
Pearson v. Brennan, 75 Fed. (2d) 958, 962 (C. C. A. 1st).

(3) *The Equitable Jurisdiction.*

Relief was properly sought in a court of equity and not by an action at law. The right asserted was equitable. The

issues were between the Receiver, claiming that he was the cestui of an express trust, and the corporate trustee who denied the relationship. The question to be adjudicated was the existence of the trust. In such a case, the equitable jurisdiction is plain. The rule is stated by Mr. Chief Justice Marshall in *Fowle v. Lawrason's Executor,* 5 Peters 495, 503;

> "In all cases in which an action of account would be the proper remedy at law, *and in all cases where a trustee is a party,* the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. (Italics inserted.)

Clews v. Jamieson, 182 U. S. 461, 479-480, is precisely in point. In that case the complainants filed a bill in equity seeking to recover funds deposited with some of the defendants and also to recover damages against other defendants. Disposing of the objection that there was an adequate remedy at law, Mr. Justice Peckham, after pointing out that the fund in question was a trust fund, said:

> "*All possible trusts, whether express or implied, are within the jurisdiction of the chancellor.* * * * The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. *A court of equity will always, by its decree, declare the rights, interest, or estate of the cestui que trust,* and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum or involves an accounting by the trustee for all that he

has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' I Pom. Eq. Jur. Par. 158." (Italics inserted.)

This principle was again recognized by this Court in the case of *Alexander* v. *Hillman,* decided December 9, 1935, and not yet reported, in which the Court, through Mr. Justice Butler, said:

> "All trusts, those implied as well as those expressly created, are within the jurisdiction of courts of equity. The doctrine of trusts is deemed to be 'the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys'. Clews v. Jamieson, 182 U. S. 461, 479. Pomeroy, Equity Jurisprudence, 4th Ed. Sec. 151."

To the same effect is 21 Corpus Juris (93) 116, and Bogert "Trusts and Trustees," pages 2536 et seq., Section 871.

B.

It Was the Duty of the District Court to Exercise Jurisdiction and It Properly Refused to Surrender It in Favor of the State Court.

Petitioners' chief argument is that the proceeding in the District Court interfered with the possession and control of a res being administered in a State court and that consequently the District Court either lacked jurisdiction or should have refused to exercise its jurisdiction. The argument is without merit, *as the jurisdiction exercised was solely in personam and not in rem.*

Moreover as heretofore shown, the jurisdiction of the District Court was properly *invoked* by the Respondent and it became the *duty* of the Court to exercise this jur-

isdiction. It could not properly abandon it in favor of the State Court.

In *McClellan* v. *Carland,* 217 U. S. 268, which case involved a conflict of jurisdiction between the Federal District Court and a State court of South Dakota, this Court said, page 281:

> "* * * It therefore appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. Chicot County v. Sherwood, 148 U. S. 529, 534, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695."

In *Kline* v. *Burke Construction Company,* 260 U. S. 226, a case cited by Petitioners, this Court said, page 234:

> "* * * The Construction Company, however, had the undoubted right under the statute to invoke the jurisdiction of the Federal court, and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction. Chicot County v. Sherwood, 148 U. S. 529, 533, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695; McClellan v. Carland, 217 U. S. 268, 282, 54 L. ed. 762, 767, 30 Sup. Ct. Rep. 501."

(1) *Suits Against Fiduciaries Deriving Powers Under Court Appointment.*

The trust involved in this case was not created by the State Court, or by a will, or by the act of any person other than the Bank. It was created solely by the act of the Bank in declaring itself Trustee of the mortgages placed in the Mortgage Pool and issuing Participation Certificates against it (R. 17). The possession and control of the State Court rests on the fact that it appointed a successor Trustee upon the petition of the holder of a Participation Certificate (R. 19). Certainly the rights of the Orphans'

Court in this matter are no higher than in cases involving fiduciaries.

The numerous authorities sustaining the right to sue fiduciaries in a Federal court, where the requisites of Federal jurisdiction are present, demonstrate clearly the correctness of the decree entered in this case. These suits have been sustained when instituted for the purpose of establishing claims against the estates involved and securing adjudications of the rights of parties claiming an interest in such estates. *The cases recognize the fact that the proceedings are in personam and not in rem, that the matter being adjudicated is not the collection of a judgment or decree, but the establishment of the right asserted.* The judgment or decree does not deal with the property and order its distribution, but adjudicates questions which *precede* distribution.

Waterman v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, is a case in point. It was an appeal from a decree dismissing, for want of jurisdiction, a bill filed by an heir against an executor and other heirs, for the determination of the interest of the former in an alleged lapsed legacy and the consequent increase in the residuary estate. This Court held that the lower Court erred in dismissing the bill and remanded the cause for further proceedings. The cases are reviewed and the applicable law stated by Mr. Justice Day, at page 43:

> "* * * We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that, in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the Federal courts, which is like unto the high court of chancery in England at the time of the adoption of the judiciary act of 1789 (1 Stat. at L. 73, chap. 20), the jurisdiction

may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate, and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. In various forms these principles have been asserted in the following, among other, cases: Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Green v. Creighton (Kendall v. Creighton) 23 How. 90, 16 L. ed. 419; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Hayes v. Pratt, 147 U. S. 557, 570, 37 L. ed. 279, 284, 13 Sup. Ct. Rep. 503; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92.

* * * * * * * *

(At page 46):

"The United States circuit court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think *has the right to, determine, as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate,* because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, *while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus*

binding the executor personally, as was the case in Payne v. Hook and Ingersoll v. Coram, supra." (Italics inserted.)

Byers v. *McAuley,* 149 U. S. 608, referred to in the opinion just quoted, is a case often cited and directly in point. There certain nonresidents of Pennsylvania, claiming an interest in a decedent's estate, filed a bill against the Pennsylvania administrator and other parties interested in the estate. The lower Court overruled a plea to the jurisdiction and entered a decree distributing the entire estate, passing upon the question of priority as between first cousins and second cousins, and distributed the property among first cousins to the exclusion of second cousins. On appeal this Court stated that Federal jurisdiction existed only on the ground of diversity of citizenship, and remanded the case with instructions to enter a decree in favor of those citizens of states other than Pennsylvania who petitioned for relief, ordering that they recover from the administrator the sums found to be due. Relief was denied only in those instances where diversity did not exist. Mr. Justice Brewer, at page 620, refers to the earlier cases and the result of them:

> "A citizen of another state may establish a debt against the estate. Yonley v. Lavender, 88 U. S. 21 Wall. 276 (22: 536); Hess v. Reynolds, 113 U. S. 73 (28: 927). But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. Yonley v. Lavender, supra. In like manner a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (Payne v. Hook, 74 U. S. 7 Wall. 425 (19: 260)) or against any other parties subject to liability (Borer v. Chapman, 119 U. S. 587 (30: 532)) or in any other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)"

The jurisdiction indicated by these cases has been exercised constantly and frequently in the Federal courts. Thus in *Harrison v. Moncravie*, 264 Fed. 776 (C.C.A. 8th), it was held that the Federal court had jurisdiction to entertain a bill seeking to recover a portion of an estate for an heir of the decedent, where proper diversity of citizenship existed. The opinion of Judge Sanborn points out, at page 779 of the opinion:

> "This jurisdiction of the federal courts, it is true, does not include the power to draw to them administration of estates as such, or to take from the proper officials of the probate court, during their administration of the estates in due course, the possession of the property necessary for that administration. But it confers the power and imposes the duty upon the federal courts sitting in equity to hear, determine, adjudge, and to enforce their adjudications of the claims of the citizens of other states, who invoke their jurisdiction by proper suits to interests as heirs, legatees, distributees, or creditors in estates in possession of officers of probate courts of states other than those of the residence of the claimants engaged in the administration thereof, although such officers may have obtained their possession before such suits were commenced in the federal courts.
>
> "The affirmance and exercise of this jurisdiction has been frequent and constant in all the federal courts. Illustrations of its exercise may be found in adjudications of the rights of heirs in Byers v. McAuley, 149 U. S. 608, 610, 620, 621, 622, 13 Sup. Ct. 906, 37 L. Ed. 867; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 41, 43, 45, 46, 30 Sup. Ct. 10, 54 L. Ed. 80, and in many other cases. Illustrations of its exercise in the adjudication of the rights of devisees and legatees may be found in Gaines v. Fuentes et al., 92 U. S. 19, 20, 23 L. Ed. 524; Richardson v. Green, 61 Fed. 423, 429, 435, 9 C. C. A. 565, 571, 578; Ellis v. Davis, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006; and Sawyer v. White, 122 Fed. 223, 227, 58 C. C. A. 587, 581. Illustrations of its affirmance and exercise in the adjudication of the rights of creditors may be found in Brun et al. v. Mann, 151 Fed. 145, 150, 151, 80 C.

C. A. 513, 518, 519, 12 L. R. A. (N. S.) 154, Union Bank of Tennessee v. Vaiden, 18 How. 503, 15 L. Ed. 472, Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130, Suydam v. Broadnax, 14 Pet. 67, 74, 10 L. Ed. 357, Borer v. Chapman, 119 U. S. 587, 588, 589, 7 Sup. Ct. 342, 30 L. Ed. 532, Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260, Arrowsmith v. Gleason, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630, Johnson v. Waters, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547, Hayes v. Pratt, 147 U. S. 557, 570, 13 Sup. Ct. 503, 37 L. Ed. 279, and Security Trust Co. v. Black River National Bank, 187 U. S. 211, 227, 23 Sup. Ct. 52, 47 L. Ed. 147."

(Also see *Chicago Title & Trust Co.* v. *Fox Theatres Corporation* (CCA-2) 69 F. (2) 60, 62; *Shelby* v. *Bacon,* 10 How. 55, 69, 70.)

In the cases cited, the jurisdiction of the Federal courts depended on diversity of citizenship. But the principles established by them apply with full force to the present case in which the jurisdiction of the Court is based on the statutes above quoted relating to suits by receivers of closed banks in connection with winding up the affairs of the banks. Because of these statutes and following the intent of Congress as expressed by them, it has been the policy of the Comptroller of the Currency to direct that the litigation involving the winding up of affairs of national banks, be instituted in the Federal courts to the end that the office charged with this important function of liquidation may secure uniformity of precedents and procedure. The wisdom of such a policy is apparent.

Another example of the exercise of the same jurisdiction is found in the line of cases establishing the right of a receiver of a national bank to sue in the Federal courts fiduciaries appointed by State courts to establish claims against their estates for stock assessments. See: *Zimmerman* v. *Carpenter,* 84 Fed. 747, 748-751 (C. C. S. D.); *Brown* v. *Ellis,* 86 Fed. 357, 358-359 (C. C. Vt.); *Thomas* v. *Commonwealth Trust Co.,* 2 F. Supp. 654, 655 (D. C. W. D. Pa.).

(2) *Receivership Cases.*

Proceedings for the appointment of receivers are quasi in rem. The nature of a receivership is such that the appointing court must have custody and possession of the receivership to an extent not required in many other cases. The situation is such that it is often said that the possession and control of the receiver is the possession and control of the court. Even in these cases, however, it is well settled that a court of competent jurisdiction may enter a judgment or decree which conclusively establishes the right of a creditor to participate in a receivership distribution to be made in another court.

The leading case of this type is *Riehle* v. *Margolies*, 279 U. S. 218, where it was held that a judgment recovered in a State court must be accepted as a proper claim in receivership proceedings being conducted in a Federal court. Mr. Justice Brandeis, at page 223 of the opinion, said:

> "The contention that the judgment is not conclusive rests upon the argument that because the appointment of the receiver draws to the appointing court control of the assets and in the distribution of them among creditors, there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam.
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> * * * * * * * *

(page 225)

> "The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court. Thus, a judgment of a federal court may establish conclusively the fact which entitles one to share in a decedent's estate in course of administration in a state court. Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Hess v. Reynolds, 113 U. S. 73, 28 L. Ed. 927, 5 Sup. Ct. Rep. 377; Byers v. McAuley, 149 U. S. 608, 620, 37 L. ed. 867, 873, 13 Sup. Ct. Rep. 906; Waterman v. Canal-Louisiana Bank & T. Co., 215 U. S. 33, 54 L. ed. 80, 30 Sup. Ct. Rep. 10. Under the Bankruptcy Act of (March 2), 1867 (14 Stat. at L. 517, chap. 176), a judgment against the debtor rendered in a suit in a state court pending at the time of the commencement of the bankruptcy proceedings established conclusively in bankruptcy the existence and amount of the debt provable against the estate. Norton v. Switzer, 93 U. S. 355, 363, 364, 23 L. ed. 903, 906, 907. Compare Hill v. Harding, 107 U. S. 631, 27 L. ed. 493, 2 Sup. Ct. Rep. 404."

(3) *The Application of These Principles to the Present Case.*

The foregoing authorities clearly show the jurisdiction of the District Court to entertain the bill and award the relief sought. The decree establishes that Respondent has a claim for $40,213.58 by reason of the advancement to pay interest, and that he is a cestui que trustent of an interest of $291,020.45. It also establishes claims of $26,191.84 and $29,225.26 to equalize his claim with those of other beneficiaries because of liquidation payments made to them by the successor Trustee prior to the decree and a claim for $1,254.84 representing interest earned on the sum withheld by the Trustee (R. 27, 28). The decree, therefore, is nothing more than an adjudication of the rights of the Respondent against the Trustee. *It does not attempt to*

interfere in any way with the administration of the trust res, to establish a lien, or to levy execution. It does not order or direct the Commonwealth Trust Company to file an accounting as Trustee of the Mortgage Pool. It is against the Trustee only, and is therefore in personam.

It must be remembered that the Commonwealth Trust Company was appointed as successor Trustee by the Orphans' Court in ex parte proceedings and purporting to act under an emergency authority as provided in an Act of Assembly of Pennsylvania approved June 7, 1917, P. L. 447, a copy of which is attached to Petitioners' Brief as an appendix, page 27. The property held by the Commonwealth Trust Company as Trustee is therefore not in the custody of the Court as in the case of the appointment of a receiver.

In *Nevitt* v. *Woodburn,* 190 Ill. 283, 289, 290, 60 N. E. 500, 503, the Supreme Court of Illinois, through Carter, J., said:

> "But a trustee may be appointed by will, deed, or in other ways, without the order of any court, and without a suit pending, and his powers, as a rule, are governed by the instrument creating the trust, and not by decree of court. Property in his possession as trustee is not in custodia legis, as in the case of receivers or other officers of the law or of the courts, and he may be called to account by any court of equity obtaining jurisdiction."

A recent Federal case in which the Circuit Court of Appeals and the lower Court took the same position is *Hinkley* v. *Art Students' League,* 37 Fed. (2d) 225, 226, 227, affirming the opinion of the District Court in the same case, which appears at 31 Fed. (2d) 469, 471-472, certiorari denied March 12, 1930, 281 U. S. 733. In this case, the Court of Appeals held that the Federal Court had jurisdiction in an equity suit brought to obtain the construction of a will, in spite of the fact that the trust was being administered in the State Court, the Court holding that the trustees were not

officers, such as receivers, administrators, sheriffs and marshals, whose possession of property is the possession of the Court.

On page 22 of Petitioners' Brief they question the *authority* of the Bank to maintain and operate a Mortgage Pool. *We cannot see that this issue is involved in the question of jurisdiction to which these proceedings are restricted.* It may be pointed out also that there was no suggestion in the proceedings in the lower Court that the Mortgage Pool was improper, *and hence the issue was not raised below;* and an examination of the Specifications of Error on page 6 of Petitioners' Brief does not disclose that the question is embraced within any of said specifications.

However, the fallacy of Petitioners' argument is apparent when one analyzes the settled Pennsylvania practice with respect to the manner of asserting rights against fiduciaries charged with dereliction. The Bank was Trustee of the Mortgage Pool. It also acted as administrator, executor, guardian and the like for numerous estates. As fiduciary for these specific estates, it acted under the appointment of the State Court just as did the fiduciaries involved in the cases discussed previously in this brief. It had the duty of accounting as executor, administrator, guardian and the like for each estate in which it acted. Under Pennsylvania practice, if such accounting showed that it had failed in any respect, either by making improper investments, or in any other manner, it would be surcharged in an amount equivalent to the loss shown. If, for example, it was improper to invest funds of individual estates in the Mortgage Pool, the Bank would be surcharged in the proper amount upon filing its account as fiduciary for the estate owning the Participation Certificate. Such a surcharge would be a general claim against the Bank and would not be paid out of the Mortgage Pool. It is apparent that no court would order a defaulting fiduciary to

respond out of assets held in trust for other beneficiaries.

The record does not show a single instance in which the Bank was surcharged on the ground that it was improper to invest funds of specific estates in the Mortgage Pool. The Trustee could have raised in the District Court as fully as in the Orphans' Court any matter of defense which it might wish to assert against the claim of the Receiver. The fact is, however, that no defense to the existence of the claim of the Bank was presented in the District Court. In view of what has been said, it is apparent that Petitioners' visualized conflict of courts does not and could not arise.

At page 10 of their brief, Petitioners refer to the portion of the District Court's decree by which it retained jurisdiction to make such further orders and decrees, if any, as may become necessary, and say that this indicates an intent to interfere with the administration in the State Court. This criticism is unfounded. The form of the decree was not only approved by Petitioners' counsel (R. 28) but was also entirely proper under the circumstances. *It is a customary paragraph in equity decrees and certainly cannot operate to increase the jurisdiction of the Court.*

In *Wayman* v. *Southard,* 10 Wheat. 1, at page 23, Chief Justice Marshall stated:

> "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised."

To the same effect is *Olcott* v. *Headrick,* 141 U. S. 543, 547, 548 and *Riverdale Cotton Mills* v. *Alabama & Georgia Manufacturing Co.,* 198 U. S. 188, 195, 196.

A somewhat similar decree was approved in a case involving the administration of an estate in *Alexander* v. *Fidelity Trust Co.,* 249 Fed. 1, 13 (C. C. A. 3).

The District Court did not retain jurisdiction for the purpose of interfering with the rights of the Orphans' Court in connection with the trust property, but to protect Respondent in event that questions not then foreseen should arise before the claim is satisfied.

C.

The Right of the Receiver to Proceed by Plenary Suit in the Federal Court in Lieu of Establishing His Claim in the Orphans' Court.

In the last analysis, Petitioners' argument is that the Trustee may be sued by a creditor or a beneficiary only in the Court appointing him. Such a ruling would permit a Trustee to repudiate every obligation so long as he could evade the process of the Court administering the trust. The cases do not recognize such a principle. *The rule is that a plaintiff has the right to establish his claim in a forum of his own choosing and is not confined to one selected by the defendant or to the one in which the administrative distribution is to be made.*

It is well settled in Pennsylvania that an executor, administrator, or other fiduciary, may be sued in the Courts of Common Pleas and that the Orphans' Courts are *not* the exclusive tribunals for adjudicating claims against estates. The Orphans' Courts have exclusive jurisdiction over decedents' estates with respect *to matters of distribution only*, and the fiduciaries administering such estates are *frequently* sued in other tribunals. Furthermore, if the time for distribution arrives before claims being asserted in the Courts of Common Pleas have been adjudicated, the Orphans' Courts will ordinarily suspend distribution until such time as the Courts of Common Pleas have adjudicated the claims before them. These principles are so well settled in Pennsylvania practice as to require no extended citation of authorities.

One of the earliest cases is *Hammett's Appeal,* 83 Pa. 392, 396, where Mr. Justice Agnew said:

> "* * * Our conclusion does not affect the prerogative of other courts, but only the rights of the creditors. They may, if they choose, persist in a common-law suit to the end to reach real estate or some other fund, but if they fail to come in on a fund in due course of distribution in the Orphans' Court, after notice of the proceeding there, they may lose their grasp upon a fund which that court alone has jurisdiction to distribute among the creditors."

The jurisdiction of Courts of Common Pleas extend to establishing rights under wills. Thus, in the case of *Appeal of Hall et al.,* 112 Pa. 42, 54, 55, it is held in the opinion by Mr. Justice Clark:

> "* * * The jurisdiction of the Common Pleas, in this form, to establish a right under a will is fully considered in the Fidelity Insurance Co.'s Appeal, 3 Outerbridge, 443. In that case a bill was filed by the members of a church organization against the executors of Charles Macalester, deceased, to enforce their rights under the will in reference to the erection of a church which the testator, in his will, had directed to be built out of the funds of his estate, and it was held that the jurisdiction of the Orphans' Court was not exclusive, but that the Common Pleas had jurisdiction in the premises. Our brother TRUNKEY, delivering the opinion of this court, says: 'The Orphans' Court is a special tribunal for specific cases; it is not vested with the general powers of a court of equity. It has exclusive jurisdiction to ascertain the amount of estates of decedents and order their distribution among those entitled, whether creditors, legatees or distributees. But the remedy of the creditor to establish his debt in a common law court is not taken away: Hammett's Appeal, 83 Pa. St. 392. And in some circumstances he may have execution upon his judgment. Legatees are authorized by the Act of February 24th, 1834, to proceed by action in a common law court to recover a bequest of money or

other goods or chattels when the executor has assets, without interference with the exclusive jurisdiction of the Orphans' Court in the settlement and distribution of the estates of decedents: Burt v. Herron's Ex'rs, 66 Pa. St. 400. * * *' "

So too in *Goodwin* v. *Colwell,* 213 Pa. 614, 616, it is said by Mr. Justice Potter:

"* * * The jurisdiction of the court of common pleas sitting in equity to establish a right under a will is maintained in Hall's Appeal, 112 Pa. 42, 3 Atl. 783. We think that in the present case the right of the plaintiffs to maintain this bill cannot be questioned. *Its purpose is not primarily to compel the distribution of an estate, but it is to have a trust declared for the benefit of those entitled thereto.*" (Italics inserted)

Strouse v. *Lawrence, Admrx.,* 160 Pa. 421, 425, is to the same effect:

"Of course a creditor may proceed in a common law action to *establish his claim,* but he cannot take any part of the estate under any judgment in such case. He must come into the orphans' court and establish his claim there, and take the share of the entire estate which is allotted to him along with the other creditors." (Italics inserted)

(Also, see discussion under subdivision D, *infra,* pp. 24-29.)

If, as we have shown, the jurisdiction of the Orphans' Court is not exclusive with respect to other State courts, then it is certainly not exclusive with respect to the Federal courts. *If the respondent had the right to sue in the Court of Common Pleas and have his claim liquidated, and was not required to take action solely in the Orphans' Court, then he clearly has the same right by virtue of the Federal statutes already cited to bring a similar action in the District Court.*

One further fact should be pointed out. The Pennsylvania cases just referred to are concerned with estates

subject to the exclusive jurisdiction of the Orphans' Court. In the case at bar, the estate in question is an inter vivos trust. The Orphans' Court had no jurisdiction whatever over such trusts until the Pennsylvania Act of June 26, 1931, P. L. 1384, printed at page 38 of the Appendix, was passed. Prior to the passage of this Act, jurisdiction over inter vivos trusts was in the Courts of Common Pleas. The Act referred to extended the jurisdiction of the Orphans' Court to such trusts, but a concurrent jurisdiction continues in the Courts of Common Pleas: See *Schwartz* v. *Schwartz,* 316 Pa. 318, 320.

It is clear from the foregoing that the Orphans' Court, which the petitioners say has exclusive jurisdiction, does not have sole jurisdiction under Pennsylvania law, but only concurrent jurisdiction with the State court having general equity powers.

D.

The Federal Court Had Jurisdiction to Determine the Nature or Status of the Claims as General, or Preferred, or Entitled to Priority Payment, as the Circumstances of the Case Required, and the Judgment Thus Rendered Does Not Encroach Upon the Jurisdiction of the Orphans' Court Nor Disturb the Assets in its Custody.

There would seem to be no reasonable doubt, in view of the previous discussion, (*supra,* pages 10 to 17), that the Federal court had jurisdiction to establish a *simple debt or claim* in favor of the receiver of the bank, and that the judgment thus rendered was entitled to recognition by the Orphans' Court in the distribution of the assets.

However, the Circuit Court of Appeals further held that it had *jurisdiction* to determine the status or class of the claims presented (R. 36) and in that connection affirmed (R. 39) the judgment of the trial court (R. 27) and found that the receiver was entitled to a general claim in the sum of $291,020.45, and that said claim was subject to distribu-

tion or dividends on a pro rata basis with the certificate holders; that he was entitled to be made whole as to past dividends which should have been paid upon said general claim, together with interest upon said back dividends, so as to place the receiver upon an equality with other creditors who had previously received dividends; and further found that the receiver was entitled to a preferred or priority claim in the sum of $40,213.58 by way of subrogation, to reimburse the bank for advancements of interest made to the other creditors.

It is submitted that the Circuit Court of Appeals was correct in thus holding.

The problem here presented can be solved by the application, by analogy, of the well settled principles governing the establishment of claims against the estates of decedents. It is familiar doctrine that in the settlement of an estate of a decedent, the courts find it necessary, both in the course of probate proceedings and in separate or plenary proceedings, to determine priority, preferred, and general claims, and to provide for distribution according to the status or class of claims thus adjudicated. For example, in probate proceedings, frequently, by statute, claims representing the expenses of the last illness, funeral expenses, etc., are given priority or preferred status. There would seem to be no doubt, as a matter of principle, that if, under the law, certain types or classes of creditors are entitled to preferred or priority status, such claims can be established against the estate by separate or plenary proceedings, and that the judgments establishing the claims are entitled to appropriate recognition for payment by the order of the probate court in due course of administration when the judgment has been certified or submitted to it.

It is immaterial, of course, whether the priority or preferred status is accorded by specific statutory provisions or by the basic, fundamental principles of the common law or of equity. These matters concern merely the type or class of claim to be allowed, and do not affect the question

of *jurisdiction* of a court in a plenary proceeding to establish and adjudicate the claim. As previously indicated, (*supra,* pages 11 to 17), the judgment establishing the claim, whether general or preferred, is in *personam,* and does not have the effect of encroaching upon the jurisdiction of the probate court; its distributive probate jurisdiction is permitted to operate, and the judgment in the plenary proceedings establishing the claim is merely accorded proper recognition. (See also *Chicago Title and Trust Company* v. *Fox Theatres Corporation* (C. C. A.-2), 69 Fed. (2d) 60, 61.

In this connection, attention is directed to the case of *Order of St. Benedict* v. *Steinhauser,* (C. C. D. Minn.), 179 Fed. 137, 150-151 (affirmed 234 U. S. 640, 652). In that case suit was filed by the Order of St. Benedict in the Federal court (apparently on the ground of diversity of citizenship) against the administrator of the estate of Augustine Wirth, wherein the plaintiff claimed title to all of the property of the decedent Wirth. The administrator contended, *inter alia,* that the matter could be settled only in the proceedings in the probate court (opinion pages 148-149). The Federal court held that the plaintiff was the *owner* of all of the property of the decedent, but drew a distinction between the property which was not before the probate court for administration, and assets which were under the jurisdiction of the probate court. As to the latter, the Federal court held that while it could not disturb the possession of the probrate court of the property thus under its jurisdiction, (citing *Waterman* v. *Canal-Louisiana Bank Co., supra*), the decree of the Federal court must be recognized by the administrator in the probate proceedings, and in that connection the court said:

> "A decree will therefore be entered declaring that the Order of St. Benedict of New Jersey is the sole owner of the amount of the residue of the property, as determined by the administration in the probate court, in the hands of the administrator, and declaring that such residue be held in trust for the complainant.

"The decree will also provide that when such residue is discharged from all claims of administration, and is ready for distribution to the persons thereto legally entitled, the administrator pay it to the complainant.

"The decree will also enjoin the administrator from paying such residue to any of the heirs, or to any person other than the complainant.

"Costs will be allowed to the complainant."

In *Security Trust Company* v. *Black River National Bank*, 187 U. S. 211, this court reviewed the authorities and reiterated the settled doctrine that a Federal court having jurisdiction, (by virtue of diversity of citizenship in the particular case), had authority to establish a claim against the estate of a decedent (opinion page 228), and that when such a claim is established the creditor may:

"come in on the estate according to the law of the State for such payment as that law, *marshalling the rights of creditors, awards to creditors of his class,* yet he cannot, because he has obtained a judgment in a Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts, and if he do issue execution and sell lands, the sale is void." (Italics inserted)

In this connection also see: *Lant* v. *Manley,* (C. C. E. D. Mich.), 71 Fed. 7, 12, 13; *Swann* v. *Austell,* (D. Ct. N. D. Ga.), 253 Fed. 807, 809.

In the comparatively recent case of *Bennington County Savings Bank* v. *Commercial National Bank,* (D. Ct. W. D. La.), 2 Fed. Supp. 201-203, it was held, in substance, that a creditor having a lien on property of a decedent can enforce his lien by plenary proceedings in a separate court, and that such proceedings do not constitute interference with the probate proceedings. In that connection the court said:

"The decisions both of the Supreme Court of the United States and other federal courts, as well as those of the Louisiana Supreme Court, recognize the right of

> a creditor with a lien upon specific property to enforce it in any tribunal having the proper jurisdiction of the parties, notwithstanding the pendency of probate proceedings involving the property of the estate of the deceased debtor. This does not interfere with the handling of the estate otherwise by the state court, but simply removes that particular property from its power in order that the court to which the plaintiff is entitled to resort may determine the issues between the parties in accordance with the law of the land and the terms of the contract which the owner had entered into while living."

To the same effect see *Erwin* v. *Lowry*, 7 How. 172, 180; *German Savings and Loan Society* v. *Cannon* (C. C. D. Wash.), 65 Fed. 542, 543, 544; *Griswold et al.* v. *Central Vermont R. Co.* (C. C. D. Vt.), 9 Fed. 797, 799, 800; *Ingersoll* v. *Corum*, 211 U. S. 335, 359, 360.

While the foregoing cases relate to the enforcement of liens, whereas the instant case does not seek to establish a lien, but merely to adjudicate priority or order of preference for payment subject to the distribution proceedings in the Orphans' Court, nevertheless the lien cases are helpful by analogy in indicating the thought that the general creditors have no right to expect participation in funds or assets concerning which it has been established another creditor has priority or preference, and hence no injustice or inequity is done to the general creditors. The basis upon which relief is afforded the creditor in the Federal court in the instant case and in analogous cases is that assuming procedural jurisdiction exists (*e. g.*, diversity of citizenship, a suit involving winding up the affairs of a national bank, etc.), a Federal court of equity has authority to give such relief as may be incident to its inherent jurisdiction as a court of equity. *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, 99; *Borer* v. *Chapman*, 119 U. S. 587, 600; *Hayes* v. *Pratt*, 147 U. S. 557, 570. In such cases, where an administrator or executor (or other trustee) refuses to render the creditor relief a Federal court (otherwise having juris-

diction) can adjudicate and establish the claim against the estate without necessity of the creditor going into the probate or receivership proceedings. *J. Elwood Lee Co.* v. *Grace Hospital* (D. C. D. Mass.), 206 Fed. 994-996; *Shelby* v. *Bacon et al.*, 10 How. 55, 69-70. Such plenary proceeding is of equal validity and effectiveness as the filing of the claim in the probate court. *Schurmeier* v. *Connecticut Mutual Life Insurance Company*, 171 Fed. 1, 4-5 (certiorari dismissed, 219 U. S. 586); *Connecticut Life Insurance Co.* v. *Schurmeier*, 117 Minn. 473, 475, 476; *Bartley's Estate*, 6 Pa. Dist. 436, 437; 19 Pa. Co. 599, 600.

The writ of certiorari having limited the review in the instant case to the question of jurisdiction, it is, of course, unnecessary to dwell upon the merits of the case to sustain the action of the courts below in distinguishing between the nature or status or class of claims allowed.

E.

Petitioners' Authorities on the Question of Jurisdiction and Its Exercise.

It would serve no useful purpose to review each of the authorities cited by Petitioners. None of them denies the jurisdiction or right of a court to enter a decree of the character sought and entered in this case.

One line of authorities much relied upon by Petitioners establishes the noninterference rule as set forth in *Kline* v. *Burke Construction Company*, 260 U. S. 226. These cases have no application for the reason that the present proceedings do not attempt to interfere with the distribution of the property. In *Kline* v. *Burke Construction Company*, supra, this Court said, page 235:

> "• • • The rank and authority of the courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed

without interference from a court of the other jurisdiction is a rule of right and of law, based upon necessity; and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former, but does not apply in the latter."

In the present case, no attempt is made to impress a lien upon the property or to affect the power of distribution, although the decree of the court of appeals *does* establish the claims, and does declare in substance that the position of claimant should be equalized with that of other creditors by the payment of back dividends, and does establish the right of claimant to reimbursement, upon the theory of subrogation, with reference to the advancements for interest (R. pp. 27-28, 36-38). Manifestly the court below had the *jurisdiction* to do this under the authorities previously cited.

No injunction is granted against the Trustee nor is any order issued directing it to pay Respondent, although Petitioners' Brief (page 17) infers that this was the case. *Under the opinion of the Circuit Court of Appeals (R. 39) the decree of the District Court was modified by striking out the direction to the Trustee to pay the claim and giving priority of payment.*

Petitioners also rely upon the principles applied in the case of *Commonwealth of Pennsylvania* v. *Williams,* 294 U. S. 176, and the case of *Penn General Casualty Company* v. *Commonwealth of Pennsylvania,* 294 U. S. 189. These principles have no application here. This case does not involve the question of "public interest" stressed by this Court in the cases cited. The question of the right of State officers under a State statute is not involved. The only principle established or suggested by the cases referred to is that the District Courts should refuse to exercise their jurisdiction and appoint receivers for building and loan

associations and insurance companies where the State has provided by statute for the administration and liquidation of such institutions by State officers, and the procedure established by statute is adequate and complete and accomplishes the same end in substantially the same manner as an equity receivership in a Federal court. The cases turn upon a desire to permit State administrative agencies to liquidate such institutions. This is made perfectly clear by Mr. Justice Stone speaking for the Court in the Williams' case at pages 183 and 184:

> "The question is not the ordinary one of comity between a federal and a state court, each asserting jurisdiction over the same subject matter, and the same property, and where there are shown no special reasons addressed to the discretion of the court first acquiring jurisdiction for relinquishing its jurisdiction in favor of the other. (Citing cases) Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation."

The *Penn General Casualty* case also points out the distinction in comity between courts of concurrent jurisdiction and yielding administration to a State administrative officer. Mr. Justice Stone said, at page 198:

> "* * * While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction, see Peck v. Jennes, supra (7 How. 624, 625, 12 L. ed. 846, 847); Wabash R. Co. v. Adelbert College, supra (208 U. S. 54, 52 L. ed, 386, 28 S. Ct. 182); Harkin v. Brundage, supra (276 U. S. 43, 72 L. ed. 460, 48 S. Ct. 268), it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See Leadville Coal Co. v. McCreery,

supra (141 U. S. 477, 35 L. ed. 825, 12 S. Ct. 28). The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 304, 28 L. ed. 729, 733, 5 S. Ct. 135; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 S. Ct. 906."

It will be observed that *Yonley* v. *Lavender*, 21 Wall. 276, and *Byers* v. *McAuley*, 149 U. S. 608, cases which clearly establish the propriety of the decree of this case, are cited with approval. These cases are not overruled. When proper Federal jurisdiction exists, the Federal Courts are not obliged to defer to a State court in determining a question of a complainant's right merely because *distribution* will be made in another court.

One further suggestion in Petitioners' argument should be noticed. It is stated at page 12 of Petitioners' Brief, that the State Court entered orders "refusing to make payments" to Respondent, and that if "Respondent was aggrieved by the orders of the State Court he was bound to seek his redress in the State Court." It is difficult to understand the use of this language. There is nothing in the record or outside the record to justify such statements. The Orphans' Court has never refused to make payments to Respondent. No claim or application for payments has been made to the Orphans' Court by Respondent or his predecessor. Respondent is not aggrieved by any order of the Orphans' Court and hence has had no occasion to apply to it for redress.

It is no doubt true that if Respondent had presented a claim to the State Court, and it had been refused, his remedy would be to appeal from the order of refusal. But Respondent never presented a claim in the State Court. His predecessor was willing to be relieved of the duty of administering the Mortgage Pool, and, therefore, did not object to the appointment of a successor Trustee as re-

quested by the holder of a Participation Certificate (R. 19). But by so doing he did not submit himself to the State Court for all purposes. The substitution simplified the liquidation of the Bank by relieving the Receiver of the Mortgage Pool. Neither at that time, nor at any time since, has there been any intent or attempt to raise in the State Court any question as to the claim of the Bank. There is not now and never has been any controversy pending in a State court between the Receiver and the Trustee of the Mortgage Pool.

When the successor Trustee secured orders permitting it to make distribution, the present record indicates that the orders directed the payments to the Receiver "be suspended pending a judicial determination of the rights of the plaintiff to participate in such distribution" (R. 20-22), without stating in what jurisdiction the rights of the Receiver should be determined. The fact is that the words quoted were the prayer of the petition filed by the Trustee asking for leave to make certain payments of funds in his hands. The order of the Court was that payment to the Receiver "be and is hereby suspended until further order of Court." This action was not taken at the request of Respondent or because he had filed a claim with the Trustee. The Receiver took no action in the State Court but proceeded to secure "a judicial determination" of his rights by filing a bill in the District Court. He has never asked the State Court to adjudicate his claim and the State Court has never attempted to allow it, reject it or pass upon it in any way. If the State Court had intended that the only "judicial determination" of his rights should take place only in that Court, it would have so stated. The wording of that Court's order leaves to the Receiver the right to choose the forum. (See "Counterstatement of Case", *supra*, p. 3.)

F.

All Indispensable Parties Were Before the Court.

The certiorari in this case is limited to the question of jurisdiction and its appropriate exercise (R. 43). We believe that this does not contemplate a review of the question raised by Petitioners as to the parties to the proceeding. The question is raised by Petitioners, however, and may be disposed of briefly.

Petitioners quote the allegation in the bill to the effect that the individual defendants "are joined herein as defendants as representatives of all holders of certificates issued by the Bank of Pittsburgh against said fund of mortgages, the holders of such certificates being so numerous and so widely scattered that it would be impracticable to bring them all before the Court in this proceeding and the rights of all certificate holders being the same." Despite the fact that this allegation is admitted by the answer filed by Petitioners' counsel (R. 13), and that the same facts are stipulated by the parties in the Agreed Statement of Facts (R. 16), Petitioners now argue that the defendants are not representatives of a class and that their interests are not the same. Since the admissions in the record directly contradict the facts upon which Petitioners' argument is based, the argument itself requires little comment, especially since no certificate holder has seen fit to raise the question although the litigation has been pending for more than three years. Certainly the Petitioners by their answer and admissions are estopped from so doing. Hence the case falls squarely within Equity Rule 38, which provides:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The representative or class suits provided for by Equity Rule 38 are well known in equity. The application of such

suits to the case of trusts is well established as appears by the cases of *Kerrison* v. *Stewart*, 93 U. S. 155, and *Smith* v. *Swormstedt*, 16 How. 288.

The question as to the lack of necessary parties was not raised until the filing in the Circuit Court of Appeals of the Petition for Reargument, and is not only tardy but without merit. As the question was not raised in the Court below, it should not now be considered by this Court.

> *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458, 465.

Petitioners' authorities as to the parties are clearly inapplicable with respect to the facts disclosed by this record, for the other certificate holders are *not indispensable parties*, under the Equity Rule. Under this head, Petitioners' Brief discusses at some length the question of the actions of the Bank as Trustee of the Mortgage Pool and of the filing of an account by the Receiver as Trustee of the Mortgage Pool. These obviously are not within the question of jurisdiction to which the certiorari was limited by this Court and, therefore, we will not go outside the record to answer the questions so raised.

Furthermore, from another aspect, the bill was not defective for want of indispensable parties. All certificate holders are represented by the Commonwealth Trust Co. as trustee, and it could raise, as trustee, any questions which the certificate holders could raise.

CONCLUSION.

It is clear that the District Court acquired jurisdiction over the parties, that the cause of action asserted was cognizable in a court of equity, and that Federal jurisdiction was present. It is equally clear that the relief sought and granted is in personam, and that the decree does not interfere with the possession and control of the trust res by the State Court. The Federal Courts have been almost the

exclusive forum for determining questions arising in connection with the liquidation of national banks, and there is no reason why they should withdraw from this field of jurisdiction, and thereby compel the Comptroller of the Currency to depart from the settled policy of having adjudicated in the Federal Courts questions arising in the receiverships of national banks. The well settled principles which make it proper for the Federal Courts to entertain, at the instance of private litigants, suits against fiduciaries appointed by State Courts, emphasize the propriety of the Federal Courts acting in cases brought at the instance of a public officer of the United States, pursuant to a well settled policy designed to obtain uniformity of decisions and precedents. This is especially the case where, as here, the State Court does not have exclusive jurisdiction but other State Courts have concurrent jurisdiction over the question in issue. In that event, the party seeking relief has the right to sue in the Federal Court instead of the other State Court, if the elements giving the Federal Courts jurisdiction are present, as in this case.

Respondent respectfully submits that the decree should be affirmed.

JOHN G. FRAZER,
ROBERT L. KIRKPATRICK,
Attorneys for Respondent.

GEORGE P. BARSE,
Attorney for Comptroller of the Currency,
Of Counsel.

APPENDIX.

Pennsylvania Act of April 6, 1925, P. L. 152, as amended by the Act of April 11, 1929, P. L. 512:

"Clause V. Except as hereinafter provided, the said companies shall keep all trust funds and investments separate and apart from the assets of the companies, and all investments made by the said companies as fiduciaries shall be so designated as that the trust to which such investment shall belong shall be clearly known: Provided, That every such company shall have the right to clear receipts and payments of trust money in the regular course of business in the same manner as other funds held by it: And provided further, That funds held in trust, awaiting investment or distribution, may be used by the trust company in the conduct of its business, if it shall first set aside in the trust department bonds or notes of the United States, or the Commonwealth of Pennsylvania, or other securities approved by the Secretary of Banking, of par value equal to or in excess of such trust funds, and, in the event of the failure of such trust company, the owners of the funds held in trust awaiting investment or distribution shall have a lien for the amount of such trust funds on the bonds, notes or other securities so set apart, in addition to their claim against the estate of the trust company: And provided further, That said companies may assign to their various trust estates participation in a general trust fund of mortgages upon real estate securing bonds, in which case it shall be a sufficient compliance with the provisions of this section for the company to designate clearly on its records the bonds and mortgages composing such general trust fund, the names of the trust estates participating therein, and the amounts of the respective participations; and in such case no estate so participating shall be deemed to have individual ownership in any bond and mortgage in such fund, and the company shall have the right at any time to repurchase at market value but not less than face value any such bonds and mortgages from such fund, with the right to substitute therefor other bonds and mortgages."

Pennsylvania Act of June 26, 1931, P. L. 1384:

"Section 9. The jurisdiction of the several orphans' courts, whether separate or otherwise, shall extend to and embrace—

* * * * * * * * * *

"(n) The control, removal, discharge and settlement of accounts of trustees of trusts inter vivos;

"(o) The control, removal, discharge, and settlement of accounts of trustees of life insurance trusts, whether taking effect during the lifetime or at or after the death of the insured or settlor."